In the Supreme Court of the United States

OCTOBER TERM, 1936

NOS. —

JAMES M. LANDIS ET AL., PETITIONERS

v.

THE NORTH AMERICAN COMPANY, RESPONDENT

JAMES M. LANDIS ET AL., PETITIONERS

v.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, INCORPORATED, RESPONDENT

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION

The Solicitor General, on behalf of the petitioners, prays that writs of certiorari issue to review the decree (AR. 284, NR. 280)[1] of the United States Court of Appeals for the District of Columbia, which was entered June 22, 1936, reversing an order of the Supreme Court of the District of Columbia (AR. 46, NR. 47) entered January 9, 1936.

[1] The record in the American Water Works and Electric Company case will be designated AR., and the record in The North American Company case will be designated NR.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia (AR. 271, NR. 266) were filed June 22, 1936, and are unreported. The opinion of the Supreme Court of the District of Columbia (AR. 40, NR. 42) was filed January 6, 1936, and is unreported.

JURISDICTION

The decree of the United States Court of Appeals sought to be reviewed was entered on June 22, 1936. Jurisdiction to issue the writs requested is found in the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTE INVOLVED

The suits were instituted by the respondents, unregistered holding companies, against the petitioners to enjoin enforcement of the Public Utility Holding Company Act of 1935 (49 Stat. 803, hereinafter generally referred to as the Act) on the ground that the Act is unconstitutional in its entirety. A copy of the Act is appended to this petition.

QUESTIONS PRESENTED

I. *Power.*—Has the Supreme Court of the District of Columbia power, temporarily and conditionally, to stay a suit for a permanent injunction in that court, pending the final disposition by the Supreme Court of the United States of a suit in-

stituted in the same or another United States district court involving substantially similar issues of fact and law although not between the identical parties, if the Supreme Court of the District of Columbia finds the stay necessary to promote the orderly processes of justice and if that court offers the plaintiffs a temporary injunction during the stay?

II. *Abuse of discretion.*—Assuming that the Supreme Court of the District of Columbia has such power, was that court guilty of an abuse of discretion in granting such a temporary and conditional stay of the respondents' suits or was such action a proper exercise of the court's control over its own process?

STATEMENT

More than forty suits, all having the common purpose of enjoining *in limine* the enforcement of an Act of Congress before it could be put into practical operation, had been instituted in various federal courts throughout the country during November and early December, 1935. Seven of these had been instituted in the Supreme Court of the District of Columbia. Each of these suits involved questions which would require decision in each of the other suits. The trial and preparation for trial of these suits, each of which was of the magnitude of an important anti-trust action, would necessarily have been protracted, and would have necessitated an elaborate examination of intricate inter-

corporate relationships, consuming a great amount of time and effort of the courts as well as of the parties.

To avoid the clogging of the court's calendar with a multiplicity of suits prosecuted for a common purpose and to promote orderly and economical judicial administration, a motion was made by the Attorney General, on December 7, 1935, that the Supreme Court of the District of Columbia should stay its own proceedings in the suits pending before it until a consolidated suit involving similar issues of fact and law already instituted by the Securities and Exchange Commission in another federal district against certain representative holding companies had been disposed of. The trial court—after satisfying itself that the consolidated suit already begun would completely resolve or very substantially narrow the issues involved in the suits before it, and that the plaintiffs in those suits would be adequately protected in the interim—ordered the proceedings in the suits before it stayed conditionally and temporarily pending the final disposition of the consolidated suit brought by the Commission. The Court of Appeals, with one separate concurring opinion and one dissenting opinion, reversed the action of the trial court and held in effect that a stay may not be granted in the discretion of the trial court, pending the disposition of another suit, unless the disposition of the suit tried will render the others technically *res adjudicata*.

A. THE GOVERNMENT'S POSITION BEFORE THE TRIAL COURT

The Government suggested to the trial court that proceedings in the seven suits [2] filed in that court to contest the validity of the Act be stayed pending the final disposition of the civil suits which the Commission had already instituted against Electric Bond and Share Company and its principal intermediate holding company subsidiaries in the United States District Court for the Southern District of New York. The Government urged that the stay was necessary to promote the orderly processes of justice for the following reasons:

(1) The terms of the Act required certain types of utility holding companies to register with the Commission prior to December 1, 1935, or to refrain from conducting certain kinds of interstate commerce after that date. On December 1, 1935, the Government was confronted with more than forty suits (exclusive of stockholders' suits) filed on behalf of more than one hundred plaintiffs in at least twelve different federal district courts (AR. 99, NR. 101). All of such suits in effect sought to obtain a declaration that the Act was unconstitu-

[2] The plaintiffs in two of these seven suits are the present respondents. The plaintiffs in four of the other suits have stipulated with petitioners that their suits shall be governed by the disposition of the present suits. The plaintiff in the last of the seven suits, after hearing on the motion for the stay, ceased to be a holding company within the meaning of the Act, and dismissed its bill of complaint.

tional in its entirety and to enjoin the enforcement of the Act against the plaintiff holding companies, none of which had registered as required by the Act. Seven of these suits had been filed in the Supreme Court of the District of Columbia, and there was reason to believe that, if the stay were not granted, many other suits would be filed in this District, since virtually all the suits outside of the District were jurisdictionally defective as to the petitioners—Washington officials—for want of valid service and proper venue (AR. 241, NR. 238).

(2) While the bills filed against Government officials, including the bills of the present respondents, differed somewhat in detail, all admittedly raised the same fundamental questions of law as to the validity of the Act (AR. 255–256, NR. 251–252). Each bill admitted that the plaintiff was a holding company within the meaning of the Act and that the Act, if valid, required the plaintiff to register. Although none of the plaintiffs in any of these suits had registered and for that reason none of the specific regulatory provisions applicable solely to registered companies and their subsidiaries were applicable to these plaintiffs, the bills all sought to have the Act in its entirety declared unconstitutional and to have the enforcement of all of its many regulatory provisions enjoined. Although there might be special circumstances affecting a particular company which might, in due course, after the determination of the validity of the registration provisions of the

Act, require a judicial determination of the effect of certain specific regulatory provisions of the Act upon that particular company, there was no justification for clogging the calendars and overtaxing the facilities of the courts with complicated, multiplicitous, and expensive suits when one authoritative decision from this Court could dispose of the major issues of law involved. This was particularly true in light of the fact that the Government had taken every possible precaution to safeguard the rights of the holding companies pending a decision by this Court upon the constitutionality of the Act.

(3) On November 26, 1935, five days before the effective date of the Act, the Commission, pursuant to express authority under section 18 of the Act, filed a consolidated suit to compel certain holding companies in the Bond and Share system to register with the Commission or refrain from certain specified acts in interstate commerce or through the mails. These suits were commenced in the United States Court for the Southern District of New York, the district of the home office of the Electric Bond and Share Company, before any bills to enjoin enforcement of the Act had been filed in the Supreme Court of the District of Columbia. The Electric Bond and Share system is the best known and one of the oldest of the great public-utility holding-company systems. It controls nearly fifteen per cent of the privately owned electric utility industry in the country. It comes

in contact with the Act at more points than any other holding-company system. Moreover, the suit was filed not only against the Electric Bond and Share Company itself but against five of its principal intermediate holding-company subsidiaries as well, with sixteen more holding-company subsidiaries subsequently added, with the Government's consent, as parties to the suit. Of these twenty-two defendants, thirteen are, by the terms of the Act, required to register with the Commission as holding companies in their own right; nine of the intervening companies either are not holding companies or are exempt from the Act as predominantly intrastate companies or as operating companies by virtue of section 3 (a) (1) and 3 (a) (2). Counsel for the Government informed the trial court that the Bond and Share defendants were preparing an answer and cross-bill which would attempt to contest the validity and enjoin the enforcement of the entire Act in the same manner as the respondents and others were attempting to do in their suits. Such answer and cross-bill were filed before the hearing of respondents' appeals.[3] (AR. 104, NR. 106.)

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[3] By stipulation (AR. 226, NR. 223), the Attorney General, the Postmaster General, and the members of the Securities and Exchange Commission, the defendants in the suits involved in the present appeals, have become cross-defendants to the cross-bill in the Bond and Share suits, thereby making all of the defendant-petitioners against whom suits have been instituted in this District parties to the Bond

(4) The suits instituted against the Bond and Share companies to compel compliance with the Act would more certainly provide a speedy and effective adjudication of the validity of the Act by this Court than would suits brought on alleged equitable grounds to restrain enforcement of the Act and to have it declared a nullity. The suits instituted against the Bond and Share companies were expressly authorized by section 18 of the Act. They were not subject to attack on jurisdictional grounds. In contrast, in the suits brought to restrain enforcement of the Act, the equitable jurisdiction of the court—i. e., the justification for application of the extraordinary remedies of equity—was open to serious contest both upon the law and the facts. The disclaimer on the part of Government officials of any intention to prosecute the plaintiffs for violation of the Act raised the question whether there was any case or controversy existing between the plaintiffs and the defendants. *Ex parte La Prade,* 289 U. S. 444; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70; *Ashwander* v. *Tennessee Valley Authority et al.,* 297 U. S. 288. And the failure of the plaintiffs to register raised the question whether they could contest the validity of those provisions of the Act which apply by their terms only to "registered"

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and Share suits and ensuring beyond peradventure the right of the Bond and Share companies to contest every provision of the Act and every point of law which could conceivably be raised by the respondents in the suits stayed.

companies.[4] It was therefore not improbable that after protracted trials in the lower court and successive appeals finally reaching this Court the complaints in such suits would be dismissed upon grounds of equitable jurisdiction without any consideration of the substantive constitutional issues.

Whether the Bond and Share suits were ultimately to be decided in favor of or against the Government, a comparison of the pleadings in the Bond and Share suits with the pleadings in the suits stayed demonstrated beyond doubt that the Bond and Share suits would decide whether the registration provisions of the Act were valid; whether such provisions were separable from other provisions of the Act; to what extent the validity or invalidity of other provisions of the Act might operate as a valid defense for failure to register; and to what extent the validity or invalidity of other provisions of the Act applicable by their terms only to registered companies might be raised by unregistered companies in an independent or

[4] Section 4 (a) of this Act makes it unlawful for certain types of public-utility holding companies after December 1, 1935, to use the mails or channels of interstate commerce to carry on certain activities unless they shall have filed with the Securities and Exchange Commission, as provided in section 5, a notification of registration and thereafter a registration statement containing certain information regarding their activities and intercorporate relationships. Virtually all other provisions of the Act by their terms are applicable only to registered holding companies and their subsidiaries, and are not enforceable against holding companies or their subsidiaries unless and until they do register.

cross-bill in equity. Such a decision would of necessity define the major issues of law and of fact in the suits before the trial court and would eliminate altogether the need of further litigation or substantially reduce its scope. Certainly none of the suits sought to be stayed would afford as broad, as comprehensive, or as certain a decision as to the validity of the Act as the Bond and Share suits.

(5) To present to a court a true picture of the affairs and position of any holding company, it was important that the court should have before it all of the principal companies in the system of which that holding company was a part. The Government had made all the principal holding companies in the Bond and Share system parties defendant to its test suits and had brought the suits in one proceeding in the Southern District of New York where all of these defendants had their principal places of business and could be served. In contrast to the Government's care in bringing an entire holding-company system before the courts, it was significant that neither The North American Company nor American Water Works and Electric Company, respondents, had chosen to join all of the principal holding companies in its system in its suit before the trial court, and that other holding companies in each of these systems had actually brought suits outside of the District of Columbia (AR. 99, NR. 101). Likewise, the other plaintiffs in the trial court were but parts of holding-company systems which, through other com-

panies, had instituted proceedings outside of the District of Columbia (AR. 99, NR. 101).

(6) To ensure preservation of the rights of all companies subject to the Act during the pendency of the Bond and Share suits, the Government had taken action in three directions. As a first step—taken before any suits were filed in the trial court—the Commission had issued regulations expressly permitting a holding company when registering to reserve any legal or constitutional right and to stipulate that its registration should be void and of no effect in the event that such a reservation should be judged invalid or ineffective (AR. 52, NR. 54). As a second step—taken before any suits were filed in the trial court—the Attorney General and the Commission had announced that the Commission would take prompt steps to test the Act in a civil suit; that until the validity of the Act had been determined by this Court in such a civil suit, neither the Attorney General nor the Commission would seek to enforce the criminal penalties of the Act; and that even after such determination they would not seek to exact penalties for earlier offenses (AR. 53–58, NR. 55–60). As a third step, the Postmaster General had announced that even if he had the authority he would not exclude any company from using the mails because of any violation of the Act pending the judicial determination of its validity by

this Court (AR. 58, NR. 60). These three steps taken by the Attorney General, the Postmaster General, and the Commission, as just described, had made it perfectly clear that, pending an adjudication by this Court on the Act, no company subject to the Act stood in any reasonable fear of any action or threat of action by any Government official.[5]

(7) To safeguard still further the rights of the respondents during the stay, the petitioners offered in the trial court to submit to a temporary injunction or interlocutory decree which would have the same effect during its pendency as a final decree. The Attorney General proposed that "*such temporary decree may take the same form and have the same scope as a final decree, and such temporary decree will not be vacated unless and until this Court is affirmatively satisfied that the decree is not warranted in fact or in law*" (Attorney General's reply brief in the trial court, p. 3). Such a temporary decree would give the plaintiffs in the trial court all that they could hope to obtain from a permanent decree of that court in their favor (see pp. 36–37, *infra*).

[5] This Court has recognized that a disclaimer by enforcement officials of any intention to institute prosecutions under a statute pending an adjudication of its validity may remove the necessity for the intervention of a court of equity. *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89.

B. THE RESPONDENTS' POSITION BEFORE THE TRIAL COURT

(1) The respondents, and the other five plaintiffs in the trial court, opposed the Government's motion for a stay on the technical ground that, unless the parties and the issues in the suits stayed were identical with those in the suits upon which the stay was to be predicated, the court had no power to stay proceedings in the causes before it, or having such power could not exercise it without being guilty of an abuse of discretion.

In support of their contention that the issues in the Bond and Share suits were not identical with the issues in their suits, respondents relied upon the fact that the Government's suits against the Bond and Share companies sought only to require registration under the Act. Despite the fact that all seven plaintiffs in the trial court had alleged in their pleadings that provisions of the Act were inseparable and void as an entirety (AR. 17, NR. 24), all such companies assumed at the hearing that the provisions of the Act were separable and that the Bond and Share suits would determine only the validity of the registration provisions of the Act (AR. 34, NR. 35). In reply the Government pointed out that if the provisions of the Act were inseparable as the holding companies had asserted in their pleadings, the Bond and Share cases would necessarily determine the validity of the whole Act; and that if the provisions of the Act were sep-

arable, as the holding companies assumed for the purposes of the motion for the stay, the cross-bill of the Bond and Share defendants would raise the validity of the entire Act in the same manner and to the same extent as the respondents had attempted to do in their suits. If the validity of the Act or any part thereof could be raised by non-registered companies in actions against non-threatening Government officials, it was clear from the first that the Bond and Share companies would raise it.

(2) It was further contended by the respondents that an adjudication that the Act was constitutional as to Bond and Share would not determine the constitutionality of the Act as to them because their position was wholly different from that of Bond and Share in that (1) the respondents did not transmit a substantial amount of energy in interstate commerce; (2) that they had no intercompany service contracts the performance of which might be interstate commerce; and (3) that they did not actually control their subsidiaries, through service contracts or otherwise, except by exercising their voting rights as stockholders. In reply the Government pointed out that all three of the above contentions were being asserted by one or more of the several defendants in the Bond and Share suits, and that the respondents' own pleadings as well as the House Interstate Commerce Committee Report (reference to which report in

this petition was made in the briefs of the petitioners in both lower courts and appear in the Record in the affidavit of the Attorney General (AR. 47–52, NR. 49–54)) revealed conclusively that the respondents' situation in these respects was no different from that of one or more of the Bond and Share defendants.[6]

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[6] The respondents' pleadings and the House Interstate Commerce Committee Report revealed the following:

(*a*) *Interstate transmission of electric energy.*—Like the respondents, most of the defendants in the Bond and Share suits do not themselves transmit gas or electric energy in interstate commerce but do so through their subsidiary companies. To be specific, neither Bond and Share, American Gas and Electric, Electric Power and Light, American Power and Light, National Power and Light, United Gas Corporation, Power Securities Corporation, nor Lehigh Power Securities Corporation—each of which is severally a defendant in the Bond and Share suits—itself transmits gas or electric energy in interstate commerce, but does so through subsidiaries one or more steps removed from it. Both the absolute and relative amounts of such interstate transmission done by the subsidiaries of the various Bond and Share defendants vary greatly; in some of the Bond and Share Company systems the interstate transmission is greater than in respondents' systems, and in some it is less. House Interstate Commerce Committee Report, Part 3, p. 50 ff., 720 (AR. 50, NR. 52). The amounts of electric energy transmitted across state lines in both of the respondents' systems are very substantial, being in the case of North American about one-fifth of all the electric energy generated, and in the case of American Water Works nearly a fourth (AR. 50, NR. 52). Like respondents, the Bond and Share defendants allege that their operating subsidiaries are engaged primarily in the intrastate business of generating and distributing electric energy or producing and distributing gas solely within the states in which they

(3) Respondents asserted, too, that the stay would cause them "great and irreparable loss and damage" (AR. 38, NR. 40). In reply, the Government pointed out to the trial court that an unappealed permanent decree, just as a temporary decree, would have to yield to any subsequent decision of this Court, and respondents were unable

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operate and only incidentally, if at all, in interstate transmission (AR. 146, NR. 148).

(*b*) *Service Contracts.*—Only two of the Bond and Share defendants (Bond and Share itself, through its subsidiary Ebasco Services Incorporated, and one intermediate company, the American Gas and Electric Company) perform, or are alleged by the Government to perform, service, sales, and construction contracts for their subsidiaries. All the remaining Bond and Share defendants, including the other four intermediate holding companies (American Power and Light Company, National Power and Light Company, Electric Power and Light Corporation, and United Gas Corporation), all comparable in size to respondent companies, have no service contracts. The respondent American Water Works and Electric Company in its bill (AR. 6) affirmatively alleges it performs such service contracts for its subsidiaries. Furthermore, North American Light and Power Company, an intermediate holding company which is itself a wholly owned subsidiary of the respondent North American Company, maintains extensive intragroup service contracts and arrangements within its own sub-holding company system according to the House Interstate Commerce Committee Report, Part 3, p. 743 (AR. 51, NR. 53). Like respondents' contentions, the Bond and Share pleadings assert that "none of said services * * * constitute interstate commerce" (AR. 142, NR. 144).

(*c*) *Control of Subsidiaries.*—All defendants in the Bond and Share suits except the two companies with service contracts exercise control over their subsidiaries only through the exercise of voting rights attached to stock owner-

to answer the trial court's repeated question how, under these circumstances, respondents would be better protected by a permanent than a temporary decree (see pp. 36–37, *infra*).

(4) Respondents did not venture to assert that the time of the court should be taken up in the trials of even the seven suits already pending in

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ship. The Electric Bond and Share Company recently announced the virtual elimination of any interlocking of directors. The issue of control through ownership of voting securities is, therefore, exactly the same in the suits against the Bond and Share companies which have no service contracts as in respondents' suits. It must be noted, too, that non-controlling holding companies are entitled to exemption from the Act under section 2 (a) (7) and that both respondents allege that they are not entitled to such exemption (AR. 3–4, NR. 7–8), just as the Bond and Share companies have done (AR. 146, NR. 148).

The Government pointed out that the real fallacy in these alleged factual differences lay in the fact that the Government is proceeding not against Bond and Share Company alone but against a whole group of differently circumstanced holding companies, and is attempting to establish the duty of each such company to register as a holding company in its own right. If, as respondents averred in their petition for the allowance of the special appeal (AR. 255, NR. 251), the stayed suits, as well as the numerous suits brought against the petitioners in other districts, are substantially identical, it cannot be gainsaid that the Bond and Share suits include one or more suits which are substantially identical with the stayed suits.

Although the Government did not contend that a decision in the Bond and Share suits would, in the technical sense, be *res adjudicata* as to the local suits, it was and is the considered opinion of the Government that the Bond and Share suits would not only simplify the issues in the suits at bar but would as a practical matter dispose of them altogether.

the District. They admitted that all the suits brought to contest the validity of the Act were substantially identical (AR. 255–256, NR. 251–252). They offered to select for trial three or four test suits and to be content that a temporary injunction should protect other suitors pending the final determination of such test suits by this Court (AR. 253, NR. 249). But the Government pointed out that the respondents had failed to show that such suits would be as broad or as typical or as free from jurisdictional difficulties as the Bond and Share suits; and that the trial court could take cognizance of such suits pending in another district, there certainly being no necessity for a separate test suit in each district.

C. ACTION OF THE TRIAL COURT

The trial court found both the law and the facts against the respondents (AR. 40, NR. 42). It found that a court has power in its discretion to grant a stay in a pending case, not finally but temporarily, if conditioned upon safeguards adequately protecting the plaintiff during the period of the stay, for any cause which furthers the orderly processes of justice. It found that the circumstances surrounding these suits constituted such cause. It found that a decision by this Court in the Bond and Share suits, even if it did not dispose of all the questions involved, would afford a speedy adjudication of the validity of the

Act and would certainly narrow the issues and assist in the determination of the questions of law involved in the respondents' suits. It found that the plan proposed by the Government would give the respondents all the protection needed pending a decision by this Court and save a great deal of labor, time, and expense. It found in substance that the respondents' proposal to try only three or four of the suits filed in the lower court and to suspend proceedings in the others, did not offer the same assurance of orderly judicial procedure as did the suggestion of the Government; that the respondents could not answer for the forty cases in other districts which might be transferred to the District of Columbia if the stay were not granted. The trial court accordingly granted the stay and conditioned its grant upon a diligent and active prosecution of the Bond and Share suits. In view of the assurances of the petitioners, given before the filing of the suits and reiterated at the argument, the trial court did not believe a formal injunction necessary, but offered the respondents the right to that relief if they desired it. Neither of the respondents, nor the plaintiffs in the other suits below, have as yet sought to avail themselves of that right. The respondents approved as to form the decrees entered by the trial court (AR. 243, NR. 240).

D. ACTION OF THE COURT OF APPEALS

The Court of Appeals reversed the trial court on the ground that discretionary power of the trial court did not extend beyond "the determination of which of two cases, pending in the same court or in courts of similar jurisdiction and involving the same issues and the same parties, shall be first heard" (AR. 274, NR. 269). The prevailing opinion written by Justice Van Orsdel is rested upon the authority of two opinions of an inferior New York court; the authoritative decision of this Court in *Kansas City Southern Railway* v. *United States,* 282 U. S. 760, upon which the Government relied, is not distinguished or even mentioned in the prevailing or concurring opinion of the Court of Appeals. The prevailing opinion states "that many questions arise in the instant cases which would not and could not be disposed of in the Bond & Share case" (AR. 273, NR. 269); and the separate concurring opinion of Justice Groner states that "a decision in the one case will not foreclose all questions in the other" and that "the order entered by the lower court is not such a stay-order as a court ought ever to enter as a matter of discretion" (AR. 276, NR. 272). But there is nothing in either of the majority opinions which questions the findings of the lower court that "a decision by the Supreme Court in the Electric Bond and Share case, even if it should not dispose of all the ques-

tions involved, would certainly narrow the issues in the pending cases and assist in the determination of the questions of law involved" and "save great amount of labor, time, and expense" (AR. 43–44, NR. 45–46).

Justice Stephens, who dissented in the Court of Appeals, was of the opinion that the granting of a stay was a matter within the sound discretion of the trial court and was not limited by any technical rule of law. He found not simply that the trial court was guilty of no abuse of discretion but that its discretion had been properly and reasonably exercised. To the objection made by Justice Groner during the argument before the Court of Appeals and not assigned as error by the respondents that the stay was prematurely granted because the pleadings were not technically closed, Justice Stephens pointed out that the data, oral and documentary, in the records and briefs presented to the trial court served to inform the trial court of the nature and character of the litigation in question at least as fully as formal answers of the Government might have done. To the further objection made by the majority of the Court of Appeals that the stay was beyond the power of the trial court because it was "for an indefinite period of time" (AR. 274, NR. 269), Justice Stephens replied that the stay-order was granted "for a definite purpose and upon definite conditions" (AR. 281, NR. 277) and, being interlocutory in nature, remained within the control

of the trial court and would be subject to modification or vacation if the progress or want of progress of the Bond and Share suits required.

The majority of the Court of Appeals held that a temporary injunction was not adequate to protect the respondents from the damage which they alleged they suffered from the mere existence of the statute. But the majority did not point out in what manner a permanent decree of the court below in favor of the respondents, if not appealed by the Government, would more fully than a temporary decree protect the respondents as to the future regardless of the later rulings of this Court on the constitutionality of the Act.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In reversing the order of the Supreme Court of the District of Columbia staying proceedings in the suits before it to contest the validity of the Public Utility Holding Company Act, pending the final disposition of the Bond and Share suits.

2. In holding that the trial court was without discretionary power to stay its own proceedings in any suit, pending the final disposition of another suit, unless under the principles of *res adjudicata* the decision in the other suit would determine all questions in the suit stayed and the judgment in the other suit would dispose of the controversy in both suits.

3. In holding that the trial court was without discretionary power to stay its proceedings pending the final disposition of another suit before the pleadings in the suit before it were technically closed.

4. In holding that the temporary decree offered the respondents would not during its effectiveness protect the respondents as fully as a permanent decree in the trial court.

5. In holding that the trial court had exceeded its discretionary power in staying proceedings in the suits before it, pending the final disposition of the Bond and Share suits.

REASONS FOR GRANTING THE WRITS

(1) The Court of Appeals for the District of Columbia has decided a question of far-reaching public importance affecting procedure in the federal courts. The Court of Appeals has held that a federal court is without discretion to stay its own proceedings pending the final disposition of another suit involving similar issues of law and fact instituted in the same or another federal court. It has held, in effect, that power to grant such a stay does not exist unless the issues and parties in both suits are identical and the disposition of one suit will render the other *res adjudicata*. However wasteful of the time and labor of an already overburdened court trials of numerous cases involving substantially similar issues may be, the trial court is deprived of the right in the exercise

of its judicial discretion to control its own processes so as to promote the orderly and economical administration of justice.

The decision of the Court of Appeals obliges a lower court to proceed, either simultaneously, or in succession, with the trial of a multitude of similar suits brought for a common purpose, without permitting the lower court to await the outcome of an appeal to this Court in one suit which promises to eliminate the need of any further litigation or at least obviate the necessity of long and protracted trials and successive appeals. It prevents the trial court from adopting a procedure which will conserve much time, labor, and expense, even though such procedure is attended by appropriate safeguards calculated to protect the substantive rights of all litigants. The decision of the Court of Appeals makes it impossible for the Government, or any other defendant against whom substantially similar actions have been brought by different plaintiffs, to avoid preparing and trying a multiplicity of almost identical suits, although the trial of one fairly representative suit followed by an appeal to this Court would eliminate the burden and expense to the courts and to the litigants of a score of suits. It limits the control of the trial court over its own process by a fixed and arbitrary rule bearing no relation to the orderly and economical administration of justice.

(2) The decision of the Court of Appeals that the power of the trial court to stay a suit before

it pending the disposition of another suit is limited to suits "involving the same issues and the same parties" (AR. 274, NR. 269) is in direct conflict with the authoritative decisions of this Court. While it is true that one of the most frequent uses of the stay has been to prevent a multiplicity of suits between the same parties in respect of the same issues, the decisions of this Court demonstrate that there is no narrow technical rule that the issues and parties must be identical in all respects in each suit in order that the proceedings in one suit may be stayed or postponed until after the disposition of another suit. Even when an independent bill is brought seeking affirmative relief in equity to enjoin a multiplicity of suits, there is no rigid rule that the parties or issues must be identical. *Di Giovanni* v. *Camden Ins. Assn.,* 296 U. S. 64, 70. The power of a court to grant a stay of a suit before it pending the outcome of another suit is an incident of a court's "inherent power to control the progress of the cause so as to maintain the orderly processes of justice." *Enelow* v. *New York Life Insurance Co.,* 293 U. S. 379, 381, 382.

In *Kansas City Southern Railway* v. *United States,* 282 U. S. 760, this Court clearly indicated that the use of the stay, by a court in respect of its own proceedings (as distinguished from affirmative relief against proceedings in another court), to prevent needless multiplicity of suits by *differ-*

ent parties against the Government, pending the final disposition of a suit begun in another district, rests in the sound discretion of the trial court. There Mr. Chief Justice Hughes stated (282 U. S. at 763–764):

> *We find no provision of the applicable statutes which deprives a District Court of jurisdiction of a suit brought by a party entitled to attack an order of the Interstate Commerce Commission in accordance with these provisions as to venue. But the existence of jurisdiction does not mean that it must be exercised and that grounds may not be shown for staying the hand of the Court.* Compare *Langnes* v. *Green, ante,* p. 531. The appellants, upon proper application could have been allowed to intervene in the earlier suit brought for the same purpose in the District Court for the Western District of Kentucky (U. S. C., Tit. 28, Sec. 45a) and could have presented there all of their grounds of attack upon the orders in question. The orders of the Interstate Commerce Commission may apply throughout the country, and there may be cases where the convenience of the parties and the interests of justice may make appropriate separate suits by different parties affected by the same order. *The question is thus one for the sound discretion of the District Court, in which such a suit is brought, to determine whether it should be permitted to continue or proceedings therein should be*

> *stayed, pending the final outcome of an earlier suit for the same purpose, to the end that there may not be a multiplicity of suits without substantial reason.* As, however, the defendants here did not raise the question of the pendency of the earlier suit until the day of final hearing, several months after the suit was begun, we see no reason for disturbing the action of the District Court in this respect. (Italics supplied.)

The order of the Interstate Commerce Commission attacked in the *Kansas City Southern* case affected many different railroads and was thus similar in its effect to the Holding Company Act, which affects many different utility holding companies. The incidence of the same order of the Interstate Commerce Commission upon one railroad may be quite different from its incidence upon another railroad differently circumstanced. Yet there can be no question, since the *Kansas City Southern* case, that a suit in one court contesting the validity of an order of the Interstate Commerce Commission may, in the discretion of that court, be stayed pending the final disposition of another suit begun in a different court by a different plaintiff to contest the validity of the same order as applied to it.[7]

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[7] In *Friedman* v. *Harrington*, 56 Fed. 860 (C. C. Mass. 1893), the circuit court for Massachusetts was asked to stay a suit before it under circumstances almost identical with those which confronted the trial court in these proceedings. In the *Friedman* case, the plaintiffs sued state officers to restrain the enforcement of a statute designed to limit, if

In the recent case of *Pennsylvania* v. *Williams*, 294 U. S. 176, this Court went so far as to emphasize that a refusal by a trial court to stay its own hand will constitute an abuse of discretion if such refusal would be prejudicial to the public interest. Mr. Justice Stone stated (294 U. S. at 185):

> *A court of equity, which in its discretion may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest,* see *United States ex rel. Greathouse* v. *Dern*, 289 U. S. 352, 359, 360, or deny relief upon perform-

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not completely abolish, the oleomargarine trade in the state. The plaintiffs were wholesale dealers in oleomargarine, sold only in the original packages in which they were brought into the state. The statement was made by the attorney general representing the defendants, and not denied by the plaintiffs, that no prosecution had been brought under the law against a dealer in the original packages and it was not proposed to bring any, until the constitutionality of the law had been passed upon by the Supreme Court in certain test cases. The circuit court stayed the case on the ground that two similar suits, testing the statute as applied to the business of *other* plaintiffs, were pending before the Supreme Court. The court stated that "as this question can only be settled by a decision of the supreme court, I must decline to pass upon the question at this time, and direct that the case be continued until the next term of this court" (56 Fed. at 861). The court stressed the point that the stay could not hurt the plaintiffs because the state officials did not propose to enforce the law against sales in the original package until the constitutionality of the Act was settled—a situation exactly analogous to the announced intentions of the Government in respect of the enforcement of the Holding Company Act during the pendency of the Bond and Share suits.

> ance of a condition which will safeguard the public interest and secure substantial justice to the complainant, see *Harrisonville* v. *W. S. Dickey Clay Mfg. Co.*, 289 U. S. 334, 338, *would seem bound to stay its hand in the public interest, where it reasonably appears that the private right will not suffer.* (Italics supplied.)

The words of Mr. Justice Stone are particularly applicable to the present suits, where the interlocutory decree offered the respondents ensures that their private rights will not suffer. See also *Gordon* v. *Ominsky*, 294 U. S. 186; *Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189.

The prevailing opinion of the Court of Appeals passed over these authoritative decisions of this Court and relied on language plucked from two opinions of an inferior New York court, which announce the rule that a trial court under New York practice is without power to grant a stay-order pending the final disposition of another suit unless the issues and parties are so identical that a final judgment in the one suit will render the other *res adjudicata*.[8] Whether the pleadings have or have

[8] *Rosenberg* v. *Slotchin*, 181 App. Div. 137 (N. Y. 1917), was a case where the court's denial of stay could clearly have been justified as a proper exercise of discretion. Almost simultaneously two parties to a contract brought suit against each other in different counties, each claiming the other had broken the contract by refusing to perform. The court's refusal to stay the suit in question was simply a refusal to help either one of the two parties, each of whom

not been closed, whether any of the parties will or will not suffer material injury by the stay, the decision of the Court of Appeals, if not modified, will deprive the Supreme Court of the District of Columbia of all power and discretion to control its own calendar to prevent numerous trials involving similar issues of law and fact whenever all the parties are not technically identical.

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was jockeying for a particular county for the trial. No particular equity was shown by either party. The court correctly maintained the *status quo*.

Jenkins v. *Baker*, 91 App. Div. 400 (N. Y. 1904), involved the right of a husband to certain funds of the estate of his deceased wife, asserted by him in a suit against the executors. These funds were alleged to be due him under a trust which his wife had set up in a savings account, she having later withdrawn the funds and given half to a daughter, one of the executors under her will (see 72 N. Y. Supp. 546). A prior suit by the husband against the daughter individually was pending on appeal, and on this ground the lower court in the second suit granted a stay. On appeal from the order granting the stay, judgment was reversed. There was no multiplicity of suits against the daughter, for the second suit was not against the daughter individually but as executor. And the New York court ruled that a stay should not have been granted because the court found that "whatever disposition may be made of the first case, this one must still be *tried*." No such situation confronts this Court. As has been pointed out, the trial of the present suits may be entirely obviated, and will at the very least be greatly limited and simplified, by the decision in the Bond and Share cases.

(3) The prevailing opinions of the Court of Appeals are in direct conflict with the holding of this Court in *Kansas City Southern Railway* v. *United States,* 282 U. S. 760, in so far as such opinions suggest that the stay was improvidently granted because it was "for an indefinite period of time" (AR. 274, NR. 269). Justic Groner, in his concurring opinion, dwells particularly upon the "indefinite" character of the stay. He expressly states that "the order entered by the lower court is not such a stay-order as a court ought ever to enter as a matter of discretion" and that the stay-order was not "temporary" but for an "indefinite period," and was therefore "substantially an injunction against these plaintiffs" (AR. 276–277, NR. 272). The very type of stay-order which Justice Groner found defective, Mr. Chief Justice Hughes expressly held to be proper in the *Kansas City Southern* case—i. e., a stay "pending the final outcome" of another suit. The stay, being interlocutory, is at all times within the control of the trial court to vacate or revise for any good cause (*Perkins* v. *Fourniquet,* 6 How. 206, 209, *Fourniquet* v. *Perkins,* 16 How. 82, 85), and its indefiniteness, if there be any, is an indefiniteness dictated by the vigilance of the trial court to stand ready at all times to alter or vacate the stay as justice may require, to adjust its decree to the exigencies of the situation, and to protect the interests of the litigants to the fullest extent.

(4) The holding of the Court of Appeals that the trial court is without power to grant a stay in a suit before it before the pleadings are technically closed, finds no support in the decisions of this Court and is contrary to sound equity practice.

More than forty suits with issues similar to those here involved had been brought in various courts. The detailed allegations of each of these numerous long and complicated bills, in so far as they related to the particular holding-company system of each plaintiff, could not have been intelligently answered and countered by cross-bills by the Government without careful and long investigation and study. Hasty answers to these bills could have been no more than general denials and the drafting of adequate cross-bills would have entailed considerable time and labor. Indeed, had the Government asked for time to investigate the facts in order to frame its answers and cross-bills before requesting the stay, it might have later been met with the objection which was decisive in the *Kansas City Southern* case, *supra*—to wit, that the stay had not been seasonably requested. Far from being premature in its motion for a stay, the Government carefully followed the procedure indicated by this Court in the authorities on which the Government relied.

Moreover, the Government carefully explained to both the trial and appellate courts the issues which would be raised in respondents' suits, and

referred both courts to carefully prepared governmental reports and documents to indicate that the issues discussed by the Government were put forward in good faith and were not merely contentious. The issues were more fully detailed and explained to the trial court in the Government's arguments and briefs than would have been possible in any formal pleading. (See pp. 14–18, *supra*.)

(5) The majority of the Court of Appeals did not review the discretion which the trial court exercised. It is true that there are suggestions in the prevailing opinions reflecting upon the propriety of the trial court's exercising its discretion in the present cases in favor of a stay; but the majority did not actually review the circumstances which influenced the trial court's discretion, because under their view of the law such circumstances were irrelevant. The majority simply found that the discretion of the trial court did not extend to the granting of a stay pending the final disposition of another suit where the parties and issues are not technically identical. Neither of the prevailing opinions in the Court of Appeals questioned the finding of the trial court that "a decision by the Supreme Court in the Electric Bond and Share case, even if it should not dispose of all the questions involved, would certainly narrow the issues in the pending cases and assist in the determination of the questions of law involved" (AR. 43, NR. 45).

(6) The decision of the Court of Appeals proceeded on the assumption that it was necessary to the protection of the rights of each company affected by the Act to have its suits tried before a comprehensive test suit had been disposed of on appeal by this Court. If the Court of Appeals were correct in holding that respondents could not be adequately protected by a temporary injunction pending the disposition of the Bond and Share suits, it would follow that other suitors could not adequately be protected by a temporary injunction pending the disposition of the respondents' suits. Yet respondents did not urge that it was necessary or even desirable that all the suits against the petitioners should be tried. Counsel for the respondents stated to the trial court: "I undertake to say that it will not be difficult for us [presumably himself and Government counsel] to agree upon a group of three or four cases which will present every question that is involved in this multitude of suits, so that every one of these companies may be satisfied that its rights will be promptly determined" (AR. 253, NR. 249). But once it is recognized that the rights of other suitors may be adequately protected by temporary injunctions pending the final disposition of appropriate test suits, the Government submits that the rights of such suitors including the respondents may similarly be adequately protected pending the final disposition of the Bond and Share suits. The sole question is whether the Bond and Share suits are

fair and comprehensive test suits; that question the majority of the Court of Appeals did not even consider.

(7) Neither of the prevailing opinions in the Court of Appeals pointed out in what respect a stay, coupled with a temporary injunction, would expose the respondents to any damage from which a permanent decree of the trial court could protect them. A permanent decree of the trial court, just as an interlocutory decree, would have to yield to the law as subsequently declared by this Court in other cases. If the respondents obtained a final decree from the trial court, they could not appeal from a decree in their favor. Yet such a final decree would not protect the respondents in the event that subsequent decisions of this Court in other cases should establish that the decree had been based upon a rule of law different from that announced by this Court. The power to dissolve or modify a continuing decree—whether it be permanent or interlocutory—in so far as it relates to future acts, after the conditions on which it was based are altered by the decisions of this Court declaring the law applicable to such situations, is "inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *United States* v. *Swift & Co.*, 286 U. S. 106, 114; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 431–432; cf.

Hatch v. *Wallamet Iron Bridge Co.*, 27 Fed. 673 (C. C. Ore. 1886).

So far as a decree of a court of equity is valuable to the respondents for its own sake, a temporary injunction or interlocutory decree will have the same effect during its pendency as a final decree. The respondents have not sued, nor can they sue the United States. They have brought these proceedings not against the Act but against the petitioners. And a temporary decree will certainly give them the same protection against the petitioners as would a final decree. The petitioners have offered to submit to a temporary decree which would have the same form and scope as a final decree. As the Attorney General stated on page 3 of his reply brief in the trial court: "Such temporary decree may take the same form and have the same scope as a final decree, and such temporary decree will not be vacated unless and until this Court is affirmatively satisfied that the decree is not warranted in fact or in law."

(8) Although the opinion of this Court in *Kansas City Southern Railway* v. *United States*, 282 U. S. 760, as has been pointed out, bears directly on some phases of the instant proceedings, this Court has not had occasion to define with the requisite precision the limits of the power of a trial court to control its own processes to promote the orderly and economical administration of justice. Whatever may be the limits upon the power of one federal

court to grant a stay pending the final outcome of another suit in the same or another federal court, such limits ought to be clearly defined by this Court, and not based upon the dicta of an inferior state court. The question of the power of the trial court to grant a stay and the question of the principles which should guide a trial court in exercising such discretion as it may have are vital questions transcending in importance even the significant public interests immediately involved in the present suits.

This Court certainly has never sanctioned a rule of federal procedure which makes it impossible for a trial court, particularly a court of equity, to stay its own proceedings if it has reason to believe that by so doing it will, without substantial hurt or prejudice to the parties, obviate the need of fruitless and burdensome litigation. The tenor of this Court's decisions suggests that questions of the choice of a proper forum, the avoidance of a multiplicity of suits, identity of parties and issues, order of trial of related issues, in so far as they bear upon the granting of a stay, are not matters of rule but of judgment. But irrespective of what may be the ultimate decision of this Court upon the particular procedure herein suggested, it is of genuine importance that this Court should define for the guidance of the federal courts the appropriate limits of a trial court's power and discretion in granting a stay.

CONCLUSION

Because of the importance of the questions presented and because of the failure of the majority of the Court of Appeals to give proper effect to the applicable decisions of this Court, it is respectfully submitted that this petition should be granted.

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Solicitor General.

JULY 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936